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### OK! for Some

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## OK! for some: *Douglas v Hello!* in the House of Lords

### A. INTRODUCTION

Six and a half years after the wedding of Michael Douglas and Catherine Zeta Jones, the legal dispute surrounding the publication of unauthorised photographs of their wedding by *Hello!* magazine has been resolved by the House of Lords in favour of the publisher of the authorised wedding pictures, *OK!* magazine.<sup>1</sup> The 3-2 division<sup>2</sup> in the House suggests, however, that the law in this area will provide plenty of scope for future debate.

The facts in brief were these.<sup>3</sup> Prior to their wedding in November 2000, Mr Douglas and Miss Zeta Jones entered into a contract with *OK!* magazine granting *OK!* the exclusive right to publish approved photographs of the wedding, for a fee of £1 million. *Hello!* magazine was unsuccessful in its competing bid for these rights. The Douglasses undertook to take stringent security precautions to prevent any other photography at the wedding – an obligation which in the event they fulfilled. Despite these measures, however, the wedding was infiltrated by a paparazzo, Mr Thorpe, who, within 24 hours of the wedding, sold six out-of-focus<sup>4</sup> photographs to *Hello!* for £125,000. The attempt by the Douglasses and *OK!* to prevent publication of these unauthorised images failed when the Court of Appeal overturned an interim injunction on 23 November 2000,<sup>5</sup> with the result that both *OK!* and *Hello!* rushed to print. Editions of both magazines containing photographs of the wedding hit the newsstands on 24 November 2000.

Following *Hello!*'s publication of the unauthorised photographs, the Douglasses and *OK!* raised an action against *Hello!* for damages. Both claimants were successful at first instance<sup>6</sup> but in the Court of Appeal the decision in favour of *OK!* was overturned.<sup>7</sup> Thus, the position of the parties after the Court of Appeal's decision was that *Hello!* was liable to the Douglasses for breach of their privacy, with damages assessed at £14,600, while *OK!*'s claim on breach of confidence was refused. *OK!* appealed to the House of Lords.

Two points concerning this appeal by *OK!* should be noted. First, the Douglasses' only connection at this stage is as the first-named party in the case report: they were not involved in the litigation in the House of Lords. Secondly, as a result of this, the

1 *Douglas v Hello! Ltd* [2007] UKHL 21, [2007] 2 WLR 920.

2 Lord Hoffmann, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood found for *OK!* while Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe found for *Hello!*

3 More detailed accounts of the facts and, in particular, the contractual terms between the Douglasses and *OK!* can be found in the judgments of the High Court, [2003] EWHC 786 (Ch), [2003] 3 All ER 996, and the Court of Appeal, [2005] EWCA Civ 595, [2006] QB 125.

4 The unauthorised photographs are generally described as unfocused and inferior, although Lord Walker does comment (at para 278) that their informality has "a certain appeal".

5 *Douglas v Hello!* [2000] EWCA Civ 353, [2001] QB 967.

6 *Douglas v Hello!* [2003] EWHC 786 (Ch), [2003] 3 All ER 996 (on liability); [2003] EWHC 2629 (Ch) (on quantum).

7 *Douglas v Hello!* [2005] EWCA 595, [2006] QB 125.

House of Lords was not required to consider privacy at all: in Lord Hoffmann's words, "Whatever may have been the position of the Douglasses, who, as I mentioned, recovered damages for an invasion of their privacy, *OK!*'s claim is to protect commercial confidential information and nothing more."<sup>8</sup>

*OK!*'s appeal regarding the photographs was based on two separate claims, namely "interference by unlawful means with its contractual or business relations or a breach of its equitable right to confidentiality in photographic images of the wedding."<sup>9</sup> A further complicating factor derives from this first ground, the economic tort of causing loss by unlawful means: the appeal was heard and the judgment was given as a conjoined opinion with two other cases both involving the economic torts.<sup>10</sup> However, as *OK!* succeeded on its breach of confidence submissions rather than the economic tort claim, the economic tort element of the appeal will be left out of this analysis. A final comment at the outset is to emphasise that this is, of course, a decision concerning English rather than Scots law, and its impact beyond England remains to be seen.

## B. BREACH OF CONFIDENCE AND *OK!*'S RIGHTS

In order to determine whether *OK!* had an enforceable right, based on breach of confidence, the House of Lords had to consider the prior question of whether the wedding photographs amounted to confidential information. If the photographs were confidential and if *OK!* benefited from that confidence, the final issue was whether *Hello!* had infringed that confidence by publishing the unauthorised images or whether *OK!* had already placed the information in the public domain, thereby destroying its confidentiality.<sup>11</sup>

Lord Hoffmann, for the majority, concluded that the wedding photographs did constitute confidential information. In arriving at this decision, Lord Hoffmann did not consider the nature of the information as critical as might be thought. Instead:<sup>12</sup>

The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information.

Given that the photographs qualified as confidential information, the nature of *OK!*'s right also required to be determined. A significant factor appears to have been the high value of the information to both contracting parties.<sup>13</sup>

8 [2007] UKHL 21, [2007] 2 WLR 920 at para 118, per Lord Hoffmann. For a recent discussion of privacy see E Reid, "Wainwright v United Kingdom: bringing human rights home?" (2007) 11 EdinLR 83, and for comments on a number of article 8 privacy cases see H L MacQueen "Protecting privacy" (2004) 8 EdinLR 248, 420.

9 [2007] UKHL 21 at para 2 per Lord Hoffmann.

10 The full case name of the House of Lords' opinion in this case is actually: *OBG Limited and others v Allan and others; Douglas and another and others v Hello! Limited and others; Mainstream Properties Limited v Young and others and another*.

11 Although the facts were novel, the principles to be applied were those previously established in the leading breach of confidence cases in England: *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Attorney General v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109.

12 [2007] UKHL 21 at para 118.

13 Para 117 per Lord Hoffmann (his emphasis).

The point of which one should never lose sight is that *OK!* had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of *any* photographs of the wedding. That was quite clear. Unless there is some conceptual or policy reason why they should not have the benefit of that obligation, I cannot see why they were not entitled to enforce it. And in my opinion there are no such reasons. Provided that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward.

In the absence of any conceptual or policy reasons against protection, therefore, *OK!*'s interest in the confidentiality of the wedding photographs was one that the law would enforce.

From a commercial standpoint, this is a sensible result. It reflects what happens in commercial practice, when magazines and newspapers are prepared to pay large sums of money to secure exclusive rights to publish information regarding people in the news,<sup>14</sup> and it ensures that the commercial value of these exclusive deals, for the celebrities and the media, is protected. Lord Hoffmann's stance on the financial value of the deal was supported by Lord Brown: "Having paid £1m for an exclusive right it seems to me that *OK!* ought to be in a position to protect that right and to look to the law for redress were a third party intentionally to destroy it."<sup>15</sup>

Yet relying on the commercial value of a deal to determine its status as a legally protected right is potentially troublesome, and creates considerable legal uncertainty. If the Douglasses had not charged a fee at all, or if they had charged a lesser sum, or if they had donated their fee (of whatever amount) to charity, then the commercial value of the deal might be negligible, yet the facts and subject matter would remain the same. Would the law still protect the exclusive right if not supported by a substantial fee? Disagreeing with Lord Hoffmann's "appeal to economic realities" Lord Walker noted that "the confidentiality of any information must depend on its nature, not on its market value."<sup>16</sup>

If market value is not a helpful yardstick for whether specific information benefits from an obligation of confidence, what guidance can be derived from the nature of that information? There is general consensus that anything trivial or useless would be excluded from protection, as would anything that it was in the public interest to disclose.<sup>17</sup> Other than this, the individual opinions tend to produce a rather confused and unhelpful picture. Lord Walker disagreed with the notion that either market value or the control exercised by the Douglasses could create confidentiality and noted that the unauthorised images were not embarrassing or offensive. He therefore concluded that the wedding photographs were not protected by the doctrine of confidence.<sup>18</sup>

14 Celebrity weddings, although a popular subject for the media, are not the only ones. A good example of non-celebrities with a story to tell is the case of the Royal Marines held captive in Iran for two weeks in March and April 2007, and who then sold their stories to the press on their release.

15 Para 325. Both Lord Hoffmann and Lord Brown were influenced by the commercial elements of the deal. This is by no means unusual in developing areas. Another "celebrity case" which sought to reflect the "realities of the market place" was the false endorsement case of *Irvine v Talksport*: see Laddie J's decision at [2002] 1 WLR 2355 at paras 38-39, 43. Note however that the legal bases on which *Irvine* was decided were entirely different from those in *Douglas v Hello!*.

16 Para 299.

17 Paras 120 (Lord Hoffmann), 272 (Lord Walker) and 307 (Baroness Hale).

18 Para 294.

Can it be inferred from his analysis that embarrassing or offensive images would be protected? This would be so in the case of privacy,<sup>19</sup> but whether it also operates for confidentiality remains unexplored. Baroness Hale, on the other hand, agreed with Lord Hoffmann's analysis and noted that "we have not been given any principled reason why photographic images of this wedding should not be protected."<sup>20</sup> Accordingly, the images should "enjoy the same protection as more conventional trade secrets."<sup>21</sup> It would, however, be just as logical to ask whether there are any principled reasons why the images *should be* protected and treated as conventional trade secrets.

Lord Nicholls, dissenting, took a different approach, which avoided the need to resolve this issue. Rather than deciding whether the photographs constituted a "secret", he relied on the established scope of breach of confidence and concluded that the prior publication by *OK!* placed the allegedly secret information in the public domain. The question of whether or not the information was worthy of protection as "confidential" then became redundant, because "once the approved pictures were published, albeit simultaneously, publication of the unapproved pictures was not a breach of confidence."<sup>22</sup>

It is on this matter that one of the most serious divergences emerges in their Lordships' opinions. It was accepted by all parties that *Hello!* and *OK!* published their wedding editions almost simultaneously on 24 November 2000. Yet while Lord Nicholls held that this publication by *OK!* destroyed its claim to confidentiality, the majority decided that *Hello!*'s actions still constituted a breach of confidence.<sup>23</sup> Baroness Hale, who acknowledged that the photographs "were undoubtedly a secret unless and until *OK!* chose to publish the images authorised by the Douglasses",<sup>24</sup> did not comment on the fact that the images *had* been published by *OK!*. Lord Brown addressed this question in order to justify his decision in favour of *OK!* and stated that:<sup>25</sup>

The secret consists no less of each and every visual image of the wedding than of the wedding as a whole. Assume, for example, that *OK!* had chosen to publish photographs of the bride and groom in one issue, the guests in the next, and the presents later still. The confidence would, I think, continue throughout and I see no reason why at some point bootlegged photographs should suddenly become acceptable on the grounds that the look of the wedding was now in the public domain so that no confidentiality in its photographic image remained to be protected.

But, applying this test, at what point, if at all, would bootlegged photographs become acceptable? Again, no answer is given.

19 *Campbell v MGN Ltd* [2004] 2 AC 457.

20 Para 307.

21 Para 310.

22 Para 257.

23 As an aside, if the majority had concurred with Lord Nicholls, this would mean that *OK!* had destroyed its own case: evidence in the earlier hearings indicated that *OK!* rushed forward publication of the authorised photographs to beat or meet *Hello!* on the newsstands. If *OK!* had stuck to its original time-scale for publication and allowed *Hello!* to publish a day before, Lord Nicholls would presumably have decided in *OK!*'s favour, on the grounds that the confidential information was not in the public domain when *Hello!* published its unauthorised photographs.

24 Para 307.

25 Para 329.

Lord Hoffmann offers the most detailed and arguably the most logical solution, by treating the authorised images and the paparazzo pictures as two different pieces of information. In his analysis, *OK!*'s publication of certain authorised images meant that *those* images were in the public domain<sup>26</sup> but "no other pictures were in the public domain and they did not enter the public domain merely because they resembled other pictures which had."<sup>27</sup> Noting that he could not understand Lord Nicholls' view that publication of *approved* photographs rendered publication of *unapproved* photographs acceptable,<sup>28</sup> Lord Hoffmann concluded that *OK!* had an enforceable right of confidence in the authorised photographs.<sup>29</sup> With majority support, the award of £1,033,156 in favour of *OK!* made by Lindsay J at first instance was reinstated.<sup>30</sup>

### C. CONCLUSION

This brief summary of the breach of confidence issues in *Douglas v Hello!* has attempted to highlight some of the uncertainties that remain. The two key issues are (i) the factors that determine whether information is confidential information worthy of protection and (ii) where that information comprises a number of related images (as in the present case), whether publication of some of those images destroys the confidence in other images, whether authorised or not.

Although some may share Lord Walker's concern that "it is not obvious why a claimant should be able to invoke the law's protection for the confidentiality of his or her private life (this claim being based on the high principle of respect for human autonomy and dignity) and also to invoke its protection for the commercial confidentiality of the same or similar material, as a trade secret, until it is to be disclosed for profit at a time of his or her own choosing",<sup>31</sup> it remains the case that celebrity information is a valuable commodity. This decision reflects commercial practice and reaches a practical conclusion, although their Lordships were careful to stress that the decision does not establish an "image right" or "any unorthodox form of intellectual property."<sup>32</sup>

When taken with the Court of Appeal's decision in favour of the Douglasses, this decision would appear to mean that, where individuals control information regarding themselves (whether details of their personal lives or photographic images of a partic-

26 Any unauthorised reproduction of the approved images would thereafter be a breach of copyright rather than breach of confidence.

27 Para 122.

28 Para 121.

29 It is clear, however, that Lord Hoffmann was content to apply the recognised principles of breach of confidence in reaching this decision. For example, he considered two of the other elements of the action and acknowledged (at para 120) that, even if *OK!* had an enforceable right, it would not be breached if the information used by *Hello!* was obtained otherwise than in breach of confidence or if publication of the information was in the public interest.

30 [2003] EWHC 786 (Ch), [2003] 3 All ER 996 (on liability); [2003] EWHC 2629 (Ch) (on quantum). Damages were assessed at £1,026,706 for *OK!*'s loss of profit and a further award of £6,450 was made for wasted costs.

31 Para 275.

32 Para 124 per Lord Hoffmann. See also Baroness Hale at para 307 and compare with Lord Walker's concerns at paras 285 and 297.

ular event), then they can protect it by way of privacy, and can also exploit it commercially by passing rights to the information to other parties – rights which can be enforced through the doctrine of breach of confidence. In the words of Lord Hoffmann:<sup>33</sup>

Some may view with distaste a world in which information about the events of a wedding... should be sold in the market in the same way as information about how to make a better mousetrap. But being a celebrity or publishing a celebrity magazine are lawful trades and I see no reason why they should be outlawed from such protection as the law of confidence may offer.

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EdinLR Vol 11 pp 407-411

## The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007

The incidence of mesothelioma, a cancer once regarded as rare, is now sometimes described as having attained the stage of an epidemic.<sup>1</sup> When the UK mesothelioma register was established in 1968, 153 deaths were recorded for that year: in 2005, a peak of “around 1950-2450 deaths per year some time between 2011 and 2015” was estimated.<sup>2</sup> The most recent figures available now show that annual mortality has already entered that range, with 1969 deaths recorded in 2003.<sup>3</sup>

Two distinctive features of mesothelioma have necessitated special legal responses. The first is that the disease has a long latency period, averaging more than 40 years from asbestos exposure to diagnosis.<sup>4</sup> Recent research across a range of countries has indicated that asbestos consumption from 1960 to 1969 was significantly associated with mesothelioma deaths occurring from 2000 to 2004.<sup>5</sup> In contrast to this lengthy latency period, however, survival times for mesothelioma are short, with most deaths occurring within fourteen months of diagnosis.<sup>6</sup>

33 Para 124.

- 1 C Pelucchi et al, “The mesothelioma epidemic in Western Europe: an update” (2004) 90 *British Journal of Cancer* 1022.
- 2 J T Hodgson et al, “The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050” (2005) 92 *British Journal of Cancer* 587 at 591.
- 3 Health and Safety Executive, *Mesothelioma* (available at <http://www.hse.gov.uk/statistics/causdis/meso.htm>).
- 4 C Bianchi et al, “Latency periods in asbestos-related mesothelioma of the pleura” (1997) 6 *European Journal of Cancer Prevention* 162.
- 5 R-T Lin et al, “Ecological association between asbestos-related diseases and historical asbestos consumption: an international analysis” (2007) 369 *Lancet* 844.
- 6 This is the figure provided by the Scottish Executive (Scottish Executive, *Amendment to Section 1(2) of the Damages (Scotland) Act 1976: Consultation Paper* (2006) para 1.1). No source is given for this figure, but it is consistent with the medical literature: see, e.g. J Peto et al, “Continuing increase in mesothelioma mortality in Britain” (1995) 345 *Lancet* 535.